UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CTI III, LLC,
 	
    Plaintiff,
 	
  v.
 	
BARRY DEVINE, an individual;
TRI-MERIT, LLC, an Illinois
limited liability company;
and DOES 1 through 50,
 	
    Defendants.
	No. 2:21-cv-02184-JAM-DB
	
	ORDER GRANTING DEFENDANT TRI-MERIT'S MOTION TO DISMISS AND GRANTING IN PART AND DENYING IN PART DEFENDANT DEVINE'S MOTION TO DISMISS

CTI III, LLC ("CTI" or "Plaintiff") brought this action against Barry Devine ("Devine"), its former employee, and Tri-Merit LLC ("Tri-Merit") (collectively "Defendants"), after Devine left CTI to work for Tri-Merit, allegedly taking CTI's confidential information and trade secrets to solicit clients with him. See generally First Am. Compl. ("FAC"), ECF No. 10. CTI asserts the following claims against Defendants: (1) Misappropriation of Trade Secrets under the Defend Trade Secrets Act; (2) Misappropriation of Trade Secrets under California's Uniform Trade Secrets Act; (3) Breach of contract under the Confidentiality Agreement against Devine only;

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1   (4) Breach of contract under the Severance Agreement against

2   Devine only; (5) Violation of California Penal Code Section 502;

3   (6) Unfair Competition; (7) Intentional Interference with

4   Prospective Economic Relations; and (8) Negligent Interference

5   with Prospective Economic Relations. Id. Before the Court is

6   Tri-Merit's motion to dismiss claims five through eight and

7   Devine's motion to dismiss claims three, and five through eight.

8   Tri-Merit's Mot. to Dismiss ("Tri-Merit's Mot."), ECF No. 13;

9   Devine's Mot. to Dismiss ("Devine's Mot."), ECF No. 14. CTI

10 opposed these motions. Opp'n to Tri-Merit's Mot., ECF No. 16;

11 Opp'n to Devine's Mot., ECF No. 15. Defendants replied. Tri-

12 Merit's Reply, ECF No. 17; Devine's Reply, ECF No. 18. For the

13 reasons set forth below Tri-Merit's motion to dismiss is granted,

14 and Devine's motion is granted in part and denied in part.[1]

15

16   I.   FACTUAL ALLEGATIONS

17   CTI is a Sacramento based tax consultancy firm. FAC. ¶¶ 1,

18 8. Barry Devine worked as CTI's Business Development Director

19 from 2012 through 2020. Id. ¶ 9. By virtue of his position

20 Devine had access to CTI's propriety and confidential

21 information. Id. ¶ 28. As such, CTI required Devine to sign a

22 Confidentiality Agreement. Id. ¶ 29. Devine's employment with

23 CTI ended in November 2020. Id. ¶ 9. He and CTI then entered

24 into a Severance Agreement and General Release, pursuant to which

25 CTI agreed to pay Devine severance benefits and Devine agreed to

26

27 [1] These motions were determined to be suitable for decision
    without oral argument. E.D. Cal. L.R. 230(g). The hearing was
28 scheduled for April 5, 2022.

1   release certain claims against CTI. Id. ¶ 38.

2   Subsequently, Devine began working for Tri-Merit, CTI's

3   competitor. Id. ¶ 4. According to CTI, before he left, Devine

4   downloaded and transferred information and data from CTI's

5   computer systems, including their trade secrets, and shared them

6   with Tri-Merit. Id. ¶ 19. Devine and Tri-Merit then used this

7   information to solicit current and potential clients and referral

8   sources of CTI. Id. This suit ensued.

9

10   II.   OPINION

11   A.   Legal Standard

12   A Rule 12(b)(6) motion challenges the complaint as not

13   alleging sufficient facts to state a claim for relief. Fed. R.

14   Civ. P. 12(b)(6). "To survive a motion to dismiss [under

15   12(b)(6)], a complaint must contain sufficient factual matter,

16   accepted as true, to state a claim for relief that is plausible

17   on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

18   (internal quotation marks and citation omitted). While

19   "detailed factual allegations" are unnecessary, the complaint

20   must allege more than "[t]hreadbare recitals of the elements of

21   a cause of action, supported by mere conclusory statements."

22   Id. In considering a motion to dismiss for failure to state a

23   claim, the court generally accepts as true the allegations in

24   the complaint and construes the pleading in the light most

25   favorable to the plaintiff. Lazy Y Ranch Ltd. v. Behrens, 546

26   F.3d 580, 588 (9th Cir. 2008). "In sum, for a complaint to

27   survive a motion to dismiss, the non-conclusory 'factual

28   content,' and reasonable inferences from that content, must be

                                3

1 plausibly suggestive of a claim entitling the plaintiff to

2 relief." Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir.

3 2009).

4   B.   Judicial Notice

5   Devine requests the court take judicial notice of three

6 documents: (1) the Confidentiality and Intellectual Property

7 Assignment Agreement entered into between CTI and Devine;

8 (2) the Termination Certificate signed by Devine; and (3) the

9 Severance Agreement and General Release entered into between CTI

10 and Devine. Devine's Req. for Judicial Notice, ECF No. 14-1.

11 These documents are not proper subjects of judicial notice;

12 therefore, this request is denied. See Fed. R. Evid. 201. The

13 Court, however, considered these documents under the

14 incorporation-by-reference doctrine. See Khoja v. Orexigen

15 Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018)

16 (explaining that unlike rule-established judicial notice,

17 incorporation-by-reference is a judicially created doctrine that

18 treats certain documents as though they are part of the

19 complaint itself when the plaintiff refers extensively to the

20 document or it forms the basis of plaintiff's claim).

21   C.   Analysis

22   1.   California's Uniform Trade Secrets Act

23   Under California's Uniform Trade Secrets Act ("CUTSA"), a

24 party may recover for the "actual loss" or other injury caused

25 by the misappropriation of trade secrets. Cal. Civ. Code

26 § 3426.3 "CUTSA defines misappropriation as (1) the improper

27 acquisition of a trade secret or (2) the non-consensual

28 disclosure or use of a trade secret." Erhart v. Bofl Holding,

4

1   Inc., --F.Supp.3d --, 2020 WL 1550207, at *36 (S.D. Cal. March

2   31, 2020). A "trade secret" is information that derives

3   "independent economic value" from its confidentiality and is

4   subject to "efforts that are reasonable under the circumstances

5   to maintain its secrecy." Cal. Civ. Code. § 3426.1(d).

6   CUTSA "occupies the field" of common law claims based on

7   the misappropriation of a trade secret. K.C. Multimedia, Inc.

8   v. Bank of Am. Tech. & Operations, Inc., 171 Cal.App.4th 939,

9   954 (2009). The Act, however, does not supersede "contractual

10   remedies, whether or not based upon misappropriation of a trade

11   secret, (2) other civil remedies that are not based upon

12   misappropriation of a trade secret, or (3) criminal remedies,

13   whether or not based upon misappropriation of a trade secret."

14   Cal. Civ. Code § 3426.7(b). The Act's language "implicitly

15   preempts alternative civil remedies based on trade secret

16   misappropriation." K.C. Multimedia, 171 Cal.App.4th at 954

17   (citation omitted).

18   A claim cannot simply depend on a "different theory of

19   liability" to survive CUTSA's preemptive effect. See Id. at

20   957-59 & n.7. Rather, CUTSA supersedes "common law claims that

21   are based on the same nucleus of facts as the misappropriation

22   of trade secrets claim for relief." Id. at 958 (internal

23   quotation marks and citation omitted). "The preemption inquiry

24   for those causes of action not specifically exempted by

25   § 3426.7(b) focuses on whether other claims are not more than a

26   restatement of the same operative facts supporting trade secret

27   misappropriation. If there is no material distinction between

28   the wrongdoing alleged in a CUTSA claim and that alleged in a

1 different claim, the CUTSA claim preempts the other claim."

2 SunPower Corp. v. SolarCity Corp., No. 12-cv-00694-LHK, 2012 WL

3 6160472, at *3 (N.D. Cal. Dec. 11, 2012) (internal quotation

4 marks and citation omitted). "At the pleadings stage, the

5 supersession analysis asks whether, stripped of facts supporting

6 trade secret misappropriation, the remaining factual allegations

7 can be reassembled to independently support other causes of

8 action." Waymo LLC v. Uber Tech., Inc., 256 F.Supp.3d 1059,

9 1062 (N.D. Cal. 2017).

10   Defendants argue CTI's sixth claim for relief under

11 California Business and Professions Code Section 17200, seventh

12 claim for relief for intentional interference with prospective

13 economic relations, and eighth claim for negligent interference

14 with prospective economic relations are all superseded by CUTSA

15 since they are based on the same nucleus of facts as the

16 misappropriation of trade secrets claim. Tri-Merit's Mot. at

17 12-15; Devine's Mot. at 8.

18   CTI's sixth claim under California Business and Professions

19 Code Section 17200 concerns Devine's acquisition of data and

20 confidential information and Tri-Merit's use of that information

21 to gain an unfair competitive advantage against Plaintiff. FAC

22 ¶¶ 46-56. The Court finds this is based on the same nucleus of

23 facts as Plaintiff's CUTSA claim which alleges that Devine

24 downloaded CTI's data for the benefit of himself and his future

25 employer, Tri-Merit. Id. ¶¶ 12-22. Similarly, its seventh

26 cause of action for intentional interference with prospective

27 economic relations and eighth cause of action for negligent

28 interference with prospective economic relations rests on the

1   allegations that Defendants used the confidential information to

2   solicit CTI's clients. Id. ¶¶ 61, 62, 68. Because each of

3   these claims "alleges in essence that Defendants violated

4   [CTI's] rights by acquiring, disclosing, and/or using, without

5   consent (i.e. misappropriating) [CTI's] propriety information,"

6   the claims are superseded. SunPower Corp., 2012 WL 6160472, at

7   *13.

8   CTI does not dispute that these claims rest on the same

9   nucleus of facts as the trade secret misappropriation claim.

10   See Opp'n at 8-10. Rather, CTI contends that because this Court

11   in R.R. Donnelley & Sons Co. v. Pappas, No. 21-CV-00753-JAM-AC,

12   2021 WL 3488502 (E.D. Cal. Aug. 9, 2021) found that CUTSA does

13   not preempt claims under California Penal Code Section 502,

14   these claims that are derivative of the Section 502 claim should

15   survive as well. Id. The Court disagrees.

16   In R.R. Donnelley & Sons, this Court noted that district

17   courts were divided on the issue of whether CUTSA preempts

18   Section 502 claims based on the same nucleus of facts. 2021 WL

19   3488502, at *3. For example, in Heieck v. Federal Signal

20   Corporation, the Court found that CUTSA did not supersede

21   Section 502 claims. 2019 WL 6873869, at *4 (C.D. Cal. Nov. 4,

22   2019). In so holding the Heieck Court pointed to the provision

23   of CUTSA that states "[t]his title does not affect [. . .]

24   criminal remedies, whether or not based upon misappropriation of

25   a trade secret." Id. It reasoned that because Section 502 is a

26   criminal statute with criminal remedies, this enumerated

27   exception applied. Id. Noting the split in authority, this

28   Court decided to "err[] on the side of caution" and found CUTSA

1 did not supersede Section 502 claims. R&R Donnelley & Sons Co.,

2 2021 WL 3488502, at *3.

3   That CUTSA specifically exempts Section 502 claims from

4 supersession, even if based on the same nucleus of common facts

5 as a trade secret misappropriation claim, has no bearing on

6 Plaintiff's other claims. Accordingly, the Court grants

7 Defendants motion to dismiss Plaintiff's sixth, seventh, and

8 eighth claims for relief, without prejudice.[2] See Leadsinger,

9 Inc. v. BMG Music Pub., 512 F.3d 522, 532 (9th Cir. 2008)

10 (explaining leave to amend should be freely given unless there

11 has been undue delay, bad faith, repeated failure to cure

12 deficiencies, it would cause undue prejudice to the opposing

13 party or would be futile).

14   2.   California's Comprehensive Computer Data Access

15   and Fraud Act

16   California's Comprehensive Computer Data Access and Fraud

17 Act ("CDAFA"), California Penal Code Section 502, generally

18 prohibits "tampering, interference, damage, and unauthorized

19 access to lawfully created computer data and computer systems."

20 Cal. Penal Code § 502(a). Plaintiff alleges Defendants violated

21 subsection (c)(1), (c)(2), and (c)(7). See FAC ¶ 45. Section

22 502(c)(1) prohibits knowingly accessing and without permission

23 using any data, computer, computer system, or computer network,

24 in order to wrongfully control or obtain money, property, or

25 data. Cal. Penal Code § 502(c)(1). Section 502(c)(2) prohibits

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27 [2] Because the Court dismisses these claims on this ground, it
   does not address the parties' arguments on the economic loss
28 rule. Devine's Mot. at 15-18; Opp'n to Devine's Mot. at 13-14.

1 knowingly accessing and without permission taking, copying, or

2 making use of any data from a computer, computer system, or

3 computer network. Id. § 502(c)(2). Section 502(c)(7) prohibits

4 knowingly and without permission accessing or causing to be

5 accessed any computer, computer system, or computer network.

6 Id. § 502(c)(7). Section 502(e) enables "the owner or lessee of

7 the computer, computer system, computer network, computer

8 program, or data who suffers damage or loss by reason of a

9 violation of any of the provisions of subdivision (c) [to] bring

10 a civil action against the violator for compensatory damages and

11 injunctive relief or other equitable relief." Id. § 502(e).

12   As an initial matter, Devine argues CTI's failure to

13 specifically identify the subsections of which its claims are

14 based violates Rule 8 of the Federal Rules of Civil Procedure.

15 Devine's Mot. at 12. While CTI did not specifically name the

16 subsections it alleges Defendants breached in its complaint, it

17 did mirror the language of three subsections. FAC ¶ 45. The

18 Court finds this sufficient to give defendants fair notice of

19 the claim and the grounds upon which it rests. See Bell

20 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

21   Tri-Merit argues CTI has failed to allege sufficient facts

22 to plausibly state Tri-Merit violated CDAFA. Mot. at 10. The

23 Court agrees. The only facts CTI alleges to support this claim

24 are that Devine installed unauthorized data "while still and in

25 the course and scope of his employment for CTI." FAC ¶ 47.

26 While CTI claims Tri-Merit "ratified and adopted" such behavior,

27 such conclusory allegations are insufficient to state a claim

28 against Tri-Merit. Iqbal, 556 U.S. at 678. CTI has alleged no

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1   facts that demonstrate Tri-Merit participated in the alleged

2   unauthorized taking such that it could be liable. CTI contends

3   that even if Tri-Merit was not aware of Devine's actions and did

4   not participate, it can be liable so long as it accepted the

5   benefit. Opp'n at 6-7. Not so. See Broidy Capital Mmgt. LLC

6   v. Muzin, 19-cv-0150 (DLF), 2020 WL 1536350, at *17 (D.C.C. Mar.

7   31, 2020), aff'd, 12 F.4th 789 (D.C. Cir. 2021) (finding

8   Plaintiff had failed to state a claim against Defendants where

9   there was no allegation that they facilitated the unauthorized

10   hacking and only received the information.). Because CTI

11   alleges no facts that Tri-Merit actively participated in

12   Devine's alleged unlawful conduct, such as directing Devine's

13   acts, this claim is dismissed without prejudice as to Tri-Merit.

14   See Claridge v. RockYou, Inc., 785 F.Supp.2d 855, 863 (N.D. Cal.

15   2011) (noting the cases interpreting the statute impose

16   liability against individuals or entities who are alleged to

17   have actually participated in unauthorized "hacking"' or the

18   unlawful disclosure of information). See also Leadsinger, Inc.,

19   512 F.3d at 532.

20   Devine likewise contends CTI has failed to state a claim

21   against him. According to Devine, because he was permitted to

22   access CTI's computer systems and data while employed, his

23   access was not unauthorized, and he therefore cannot be liable

24   under CDAFA. Devine's Mot. at 12-14. He is mistaken. As the

25   Ninth Circuit explained in Christensen, the CDAFA differs from

26   the Computer Fraud and Abuse Act ("CFAA") and is interpreted

27   differently. See United States v. Christensen, 828 F.3d 763,

28   789 (9th Cir. 2015). Unlike the CFAA, CDAFA "does not require

                                    10

1   *unauthorized* access. It merely requires *knowing* access." Id.

2   "What makes that access unlawful [under CDAFA] is that the

3   person 'without permission takes, copies, or makes use of' data

4   on the computer." Id. (quoting Cal. Penal Code § 502(c)(2)).

5   Thus, CDAFA prohibits "unauthorized taking or use of

6   information" where the "CFAA criminalizes unauthorized *access*,

7   not subsequent unauthorized *use*." Id. Accordingly, "logging

8   into a database with a valid password and subsequently taking,

9   copying, or using the information in the database improperly"

10   would violate CDAFA. Id.

11   CTI has alleged just that: while Devine was still employed

12   by CTI he accessed their system and improperly copied, then used

13   their data. FAC ¶ 47. While Devine may have been authorized to

14   access the system as an employee, he was not, according to CTI,

15   authorized to copy and use the data to solicit CTI's clients.

16   Id. This is sufficient to state a claim under CDAFA. See

17   Christensen, 828 F.3d at 789.

18   Devine also argues that to satisfy CDAFA's provisions that

19   he acted "without permission", CTI had to allege that he

20   accessed the network in a manner that circumvented technological

21   or code-based barriers in place to restrict or bar a user's

22   access. Devine's Mot. at 13. The Court disagrees. As another

23   district court stated: "[c]ircumventing technical barriers may

24   be sufficient to show that a person acted 'without permission,'

25   but that does not mean it is necessary for a person to

26   circumvent technical barriers to act 'without permission.'

27   Christensen makes this clear." West v. Ronquillo-Morgan, 526

28   F.Supp.3d 737, 746 (C.D. Cal. 2020). As the West court noted,

1   in Christensen, the Ninth Circuit affirmed convictions under

2   CDAFA of individuals who accessed databases with the authority

3   to do so, without circumventing any technical or code-based

4   barriers. Christensen, 828 F.3d at 790. Accordingly, no such

5   allegation is required to state a claim under CDAFA. The Court

6   therefore denies Devine's motion as to the CDAFA claim.

7   3.   Breach of Confidentiality Agreement

8   California Code of Civil Procedure Section 1856 states:

9   (a)   Terms set forth in a writing intended by the parties

10   as a final expression of their agreement with respect

11   to the terms included therein may not be contradicted

12   by evidence of a prior agreement or of a

13   contemporaneous oral agreement.

14   (b)   The terms set forth in a writing described in

15   subdivision (a) may be explained or supplemented by

16   evidence of consistent additional terms unless the

17   writing is intended also as a complete and exclusive

18   statement of the terms of the agreement.

19   Thus, Section 1856 "creates two levels of contract integration

20   or finality: (1) the parties intended the writing to be the

21   final expression of their agreement; and (2) the parties

22   intended the writing to be the complete and exclusive statement

23   of the terms of their agreement." Kanno v. Marwit Capital

24   Partners II, L.P., 18 Cal.App.5th 987, 999 (2017). If a

25   contract "falls within level 1 (the writing is a final

26   expression) then a prior or contemporaneous . . . agreement is

27   admissible if it does not contradict the writing, and evidence

28   of consistent additional terms may be used to explain or

                                12

1 supplement the writing." Id. at 999-1000. If, however, a

2 contract "falls within level 2 (complete and exclusive

3 statement) then evidence of consistent additional terms may not

4 be used to explain or supplement the writing." Id. at 1000.

5   Devine argues CTI cannot state a claim for breach of the

6 Confidentiality Agreement as it was superseded by the Severance

7 Agreement. Devine's Mot. at 9. Specifically, Devine points to

8 clause 12 of the Severance Agreement that states "[t]his

9 agreement embodies the entire agreement of all the parties

10 hereto who have executed it and supersedes any and all other

11 agreements, understandings, negotiations, or discussions, either

12 oral or in writing, express or implied, between the parties to

13 this agreement." Id. at 11 (citing Ex. 3, ¶ 12 ("Severance

14 Agreement")). As CTI points out "[t]he crucial issue in

15 determining whether there has been an integration is whether the

16 parties intended their writing to serve as the exclusive

17 embodiment of their agreement." Masterson v. Sine, 68 Cal.2d

18 222, 225 (1968).

19   In California, the presence of an integration clause is not

20 conclusive but rather a factor which may help resolve the issue.

21 Id. To determine whether a writing is integrated, courts

22 consider: "whether the written agreement appears to be complete

23 on its face; whether the agreement contains an integration

24 clause; whether the alleged parol understanding on the subject

25 matter at issue might naturally be made as a separate agreement;

26 and the circumstances at the time of the writing." Kanno, 18

27 Cal.App.5th at 1001. Because the integration clause is not

28 conclusive on the issue of whether the parties intended the

1   Severance Agreement to be the complete and exclusive agreement

2   of the parties, Devine has failed to show at this early stage

3   the Confidentiality Agreement was superseded as a matter of law.

4   Accordingly, Devine's motion to dismiss this claim is denied.

5

6   III.   ORDER

7   For the reasons set forth above, the Court GRANTS Tri-

8   Merit's Motion to Dismiss claims five through eight against it

9   without prejudice. The Court GRANTS Devine's Motion to Dismiss

10 claims six through eight against him without prejudice. The

11 Court DENIES Devine's Motion to Dismiss claims three and five.

12 If CTI elects to amend its complaint, it shall file its Second

13 Amended Complaint within twenty days (20) of this Order.

14 Defendants' responsive pleadings are due within twenty days (20)

15 thereafter.

16   IT IS SO ORDERED.

17 Dated: May 25, 2022

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19   JOHN A. MENDEZ,
                                        UNITED STATES DISTRICT JUDGE

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